From: Weston Cann
To: Microsoft ATR
Date: 1/25/02 6:59pm
Subject: Microsoft Settlement

I wish to write to express my dissatisfaction with the proposed final judgment (PFJ) in the Microsoft case. I am not a legal professional, but I am a software developer with 10 years of experience developing across the Windows/DOS, Macintosh, and Unix platforms. As an observer of and worker within the software industry, it is my conclusion that while the intent of some provisions in the judgement are worthy, overall, the judgement as written allows and even encourages significant anticompetitive practices to continue. As both a remedy and a punitive action discouraging future misbehavior, it seems likely to fail unless areas of concern are addressed:

1) The PFJ as I read it in section III requires Microsoft to open up its networking protocols and APIs to certain businesses deemed viable and safe by Microsoft itself, under terms it determines. The release of such protocols and APIs is an essential part of any good remedy, and it is heartening to see it in the proposal.

However, having Microsoft make the decisions about what constitutes a viable business is a formula for failure. It is not difficult to imagine a scenario whereby the processes/criteria for obtaining API and protocol information become a barrier to entry, especially for those organizations not in Microsoft's favor.

Furthermore, a whole host of legitimate organizations are left out under the language of the agreement: academic institutions, governments, public interest groups, and open source developers. Not the least of these are foundations and cooperatives such as the Apache Group, makers of the market leading webserver Apache, and the SAMBA team, makers of software which enables networking interoperability between Windows and other operating systems. Each of these organizations provide valuable and widely used software, but do not qualify as businesses. Microsoft has publicly stated that it considers open source software among the biggest threats to its business, and so Microsoft has incentive to avoid disclosing information to these organizations. A fully effective PFJ absolutely must contain reasonable provisions enabling academic institutions, government organizations, public interest groups, open source developers, and others to easily obtain required information.

It is not lost on me that security concerns are referenced as reasons for the apparent concessions that let Microsoft determine recipients of documentation. Security is not an unreasonable consideration, especially as computing is increasingly associated with connectivity and communications. However, the argument that security must be maintained by secrecy regarding protocols and mechanisms is weak. Modern accepted

professional security practices, much like modern academic practices, rely on extensive and open peer review of a security mechanism or protocol, and a system is considered truly trustworthy only after being widely tested with its inner workings exposed. While no system is without security flaws, the recent plague of security problems in Microsoft's email, webserver, and office productivity products highlight the relative ineffectiveness of Microsoft's current "closed" approach. Thus, a high degree of openness -- even regarding things related to security -- is unlikely to hurt Microsoft, and might in fact make their products more secure. Additionally, if Microsoft is allowed to avoid disclosing things related to security, is not difficult to imagine a scenario where it would intermingle security protocols and standard communication protocols, thereby relieving itself of any obligation to provide information about those protocols to an outside party. Because the "security" provision outlined in section J provides only weak legitimate benefits at best for Microsoft, and has great potential for abuse, it will need to either be struck from the agreement, or carefully modified with these concerns in mind.

Additionally, the disclosure agreement leaves out file formats, which lag only slightly behind communications/networking protocols and APIs in terms of essential importance to interoperability. Addition of these to the list of things disclosed under the agreement frees consumer data from lock-in by Microsoft, and removes a significant barrier to competing products.

2) In section III of the PFJ, there is some effort against prohibiting Microsoft from drafting agreements with OEMs that are likely to be harmful to the consumer and competitors. The intent of each agreement seems worthy, but I question the overall effectiveness of the agreements, especially in light of the resourcefulness Microsoft has displayed in skirting the intent of earlier prohibitions on their activities with OEMs. The provisions in the PFJ must be tightened.

A complete solution would impose several requirements on Microsoft agreements with OEMs:

a) Microsoft may only differentiate the prices for any of its products (and associated support services) based on the volume purchased by the buyer. This price may never be greater than the published retail price for the product, or the average of the lowest retail prices found at three retailers, whichever is lower. The list of prices must be publicly available to any individual.

b) Microsoft must sell (and deliver in a timely manner) to any buyer at

the prices established, and may not make any stipulation of OEMs or
resellers as a requirement of such a sale, nor make any such
stipulations of them as requirement to resell licenses.

Combined with a sufficiently severe penalty for violation, these requirements would effectively immobilize Microsoft efforts to manipulate OEMs. It would also be easy to police: any organization which Microsoft refused to sell a product to or charged a higher-than-published price could simply report to the appropriate enforcement body.

(There is some flaw to these requirements alone -- concerns about other incentives would still be present. Microsoft could, for example, say to an important OEM "we'll pay for your marketing budget for the whole year if you will not include Competitor X's software on your machine". This highlights the difficulty of any general solution. Perhaps a mixture of the general language of the PFJ --which discourages Microsoft retaliation --and this section in my document could address the problem.)

3) Definitions within the PFJ provide loopholes big enough to drive a truck through. The language of the document suffers from lack of technical precision, which, in the end, will degrade legal precision and in turn prevent firm and timely enforcement. I advocate definition changes similar to those recommended by Dan Kegel in his online document at http://www.kegel.com/remedy/remedy2.html

4) I am concerned that the proposed Technical Oversight Committee will have limited power to report their findings and activities publicly. Especially considering the potential for different attitudes regarding enforcement at the DOJ (dependent on prevailing political winds), it would seem important for the industry and the public at large to know how effective the proposed remedies are. The actions and reports of the committee should be a matter of public record.

It is my hope that the court will carefully consider these points and include them in the final judgement.

regards,

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